

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Muoi Ho, an unmarried woman,

CV 11-0324-TUC-FRZ (JM)

Plaintiff,

REPORT AND RECOMMENDATION

V.

Federal National Mortgage Association, et al.

Defendants.

Pending before the Court is a Motion to Dismiss (Doc. 11) filed by Defendants Federal National Mortgage Association (“Fannie Mae”), Bank of America, N.A. (“BANA”), individually and as successor by merger to BAC Home Loans Servicing, L.P., and ReconTrust Company, N.A. (“ReconTrust”) (collectively “Defendants”) against Plaintiff Muoi Ho (“Plaintiff”). Plaintiff filed a response to the motion (Doc. 12), and Defendants filed a reply (Doc. 18). Magistrate Judge Marshall heard oral argument on the motion on November 2, 2011. As explained below, the Magistrate Judge recommends that the District Court, after independent review of the record, dismiss the Complaint with leave to amend the fraud claims.

1. Background

Plaintiff Muoi Ho filed her Complaint on April 7, 2011, in the Superior Court for Pima County. (Doc. 1, Notice of Removal, Ex. A, Complaint (“Compl.”), p. 1). Defendants Fannie Mae and BANA removed the action to this Court on May 27, 2011. (Doc. 1). In the Complaint, Plaintiff alleges five causes of action arising from or associated with the non-judicial foreclosure of her home: quiet title; breach of contract; violation of statute; common law fraud; and

1 consumer fraud. (*Id.*). In terms of relief, Plaintiff seeks unencumbered title to the subject
2 property, reinstatement of title in her name, and tort, contract, and exemplary damages. (Compl.,
3 p. 13-14). Plaintiff alleges that on or about January 26, 2011, her property was improperly sold
4 without recordation of the notice of sale and without notice to Plaintiff. (Compl., p. 6).

5 Plaintiff's underlying factual allegations are that, in or about January 2007, she purchased
6 residential property located at 1687 West Green Thicket Way in Tucson Arizona. The purchase
7 was financed through a loan from Imortgage.com, Inc. The loan was secured by a deed of trust
8 dated January 17, 2007. (Compl., p. 3).

9 Beginning in January 2010, Plaintiff fell behind in her payments on the loan and sought
10 a loan modification from BANA, which was the holder of the note on the loan she obtained
11 through Imortgage.com. (*Id.*). In or about May 2007, Plaintiff completed and submitted her
12 written loan modification application to BANA. From May through December 2010, Plaintiff
13 contacted BANA at least monthly and was told that:

14 (a) her application for the loan modification was complete and was
15 pending; (b) she would receive a decision shortly; (c) her chances
16 for acceptance into the program were very high; (d) she should not
17 attempt to make payments on her loan because partial payments
18 would be rejected and a complete payment of the arrears would
19 cause her application to be rejected; and (e) no "foreclosure" or
20 other attempt to take her property would be attempted while her
21 application was pending.

22 (Compl., pp. 4-5). Then, in about mid-December 2010, Plaintiff received a letter from BANA
23 indicating her loan modification application was rejected because she failed to submit the
24 requested documentation. (Compl., p. 5). Although she had in fact previously sent the requested
25 documentation, Plaintiff nevertheless began to collect the requested documents for re-submission
26 to BANA. However, on or about January 29, 2011, a notice was placed on the door of Plaintiff's
27 residence indicating that the property "is now owned by Fannie Mae," and demanding that she
28 move out. (*Id.*).

29 In or about March 2011, Plaintiff was served with a summons and complaint for forcible
30 entry and detainer ("FED"). The FED complaint stated that Fannie Mae had conducted a
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1 trustee's sale on the subject property on January 26, 2011. (Compl., p. 6). Despite having
2 resided at the subject property for approximately four years, Plaintiff never received notice of
3 the trustee's sale or a demand to quit. (Compl., p. 7).

4 **II. Standard for Motion to Dismiss**

5 A Rule 12(b)(6) dismissal for failure to state a claim can be based on either (1) the lack
6 of a cognizable legal theory or (2) insufficient facts to support a cognizable claim. *Balistreri v.*
7 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1990); *Robertson v. Dean Witter Reynolds,*
8 *Inc.*, 749 F.2d 530, 534 (9th Cir.1984). "To survive a motion to dismiss, a complaint must
9 contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on
10 its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2007) (internal quotation marks omitted). A
11 complaint that contains only "labels and conclusions" or a "formulaic recitation of the elements
12 of the cause of action" will not survive dismissal. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
13 (2007).

14 In evaluating a motion to dismiss, the Court may consider documents attached to the
15 complaint and incorporated by reference. *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F.Supp.2d
16 1096, 1101 (D. Ariz.2003). Additionally, although a plaintiff is not required to attach to the
17 complaint the documents on which it is based, as long as their authenticity is not disputed, a
18 defendant may rely on any documents referred to in or which are central to the complaint to
19 show that they do not support the plaintiff's claims. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th
20 Cir.1994), overruled on other grounds in *Galbraith v. County of Santa Clara*, 307 F.3d 1119,
21 1127 (9th Cir.2002).

22 **III. Discussion**

23 **A. Material to be considered**

24 In her response, Plaintiff asserts that the Defendants are relying on documents that should
25 not be considered by the Court in the context of a motion to dismiss. Plaintiff, without
26 specifically identifying the documents to which she objects, describes this material as "both
27 recorded and unrecorded documents concerning title to the property and noticing of the trustee's

1 sale.” *Response*, p. 2. As indicated above, the Court may evaluate not only documents attached
2 to the complaint, but any documents referred to in the complaint, but not attached, to show that
3 they do not support plaintiff’s claims. *Branch*, 14 F.3d at 454; *Marder v. Lopez*, 450 F.3d 445,
4 448 (9th Cir.2006). As such, and where appropriate, the Court will consider any such documents
5 that meet these criteria.

6 Plaintiff also requests that should the Court elect to consider documents that were not
7 attached to the complaint, that the motion be converted to a motion for summary judgment and
8 she be permitted to conduct discovery before responding. As the Court will consider only those
9 documents that are properly before it in the context of a motion to dismiss, conversion to a
10 motion for summary judgement is unnecessary. Moreover, Rule 56(f), on which Plaintiff relies
11 in making her request, requires that the party seeking relief under its terms file a supporting
12 affidavit offering specific reasons for its inability to present the facts essential to supporting her
13 claim. Fed.R.Civ.P. 56(f). Plaintiff has not met this requirement and relief under the rule is not
14 justified.

15 **B. The trustee must be dismissed**

16 Defendants argue that Recontrust, the trustee which conducted the trustee’s sale, must be
17 dismissed from this action pursuant to A.R.S. § 33-807(E), which provides:

18 The trustee need only be joined as a party in legal actions pertaining
19 to a breach of the trustee’s obligation under this chapter or under the
20 deed of trust. Any order of the court entered against the beneficiary
21 is binding upon the trustee with respect to any actions that the
trustee is authorized to take by the trust deed or by this chapter. If
the trustee is joined as a party in any other action, the trustee is
entitled to be immediately dismissed and to recover costs and
reasonable attorney fees from the person joining the trustee.

22 *Id.* Defendants assert that this statute applies because the Plaintiff has not alleged that
23 Recontrust breached its obligations under the applicable statutes or those imposed under the deed
24 of trust. *Motion*, pp. 4-5. Plaintiff counters that she has alleged a number of statutory violations
25 and specifically asserting that Recontrust failed to give notice and recorded a trustees deed
26 knowing it was false or misleading. Plaintiff’s assertions are entirely undermined in at least two
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1 ways. First, the Notice of Trustee's Sale is attached to the complaint as Exhibit 4 and the
2 Defendants have produced several Affidavits of Mailing and tracking receipts reflecting that the
3 notice was mailed and delivered. *Motion*, Exhibit C. Plaintiff offers nothing to dispute these
4 facts. Second, as explained below, Arizona law provides that disputes about the validity of a
5 trustee's sale and deed must be raised prior to the sale or they are otherwise waived.

6 **C. Plaintiff has waived her claims regarding the trustee's sale**

7 Defendants next argue that Plaintiff has waived any claims regarding the trustee's sale
8 by failing to raise them prior to the sale. Under A.R.S. § 33-811(C),

9 [A]ll persons to whom the trustee mails a notice of a sale under a
10 trust deed pursuant to § 33-809 shall waive all defenses and
11 objections to the sale not raised in an action that results in the
issuance of a court order granting relief pursuant to rule 65, Arizona
rules of civil procedure, entered before 5:00 p.m. Mountain standard
12 time on the last business day before the scheduled date of the sale.

13 A.R.S. § 33-811(C). In *Habig v. FDIC*, CV 10-2500-PHX-SRB (2010), Judge Bolton analyzed
14 this statute in relation to a claim identical to that urged by the Plaintiff here. As is the case here,
15 the plaintiffs in *Habig* asserted that they had not been given notice of the pending sale and
16 therefore were unable to timely raise their objections. In rejecting this argument, Judge Bolton
17 offered the following analysis:

18 If Plaintiffs were able to nullify the trustee's sale of their property
19 that took place on July 14, 2010, by filing a lawsuit three months
later, when they did not seek or obtain injunctive relief under
20 Arizona's Rule 65 before the sale took place, then A.R.S. § 33-
21 811(C) would have no meaning at all. Plaintiff's allegation that
they did not receive notice of the sale does not alter this
interpretation. Arizona law only requires that notice be mailed, not
22 that it be received. *See A.R.S. §§ 33-809, 33-811(C); Transamerica*
Fin. Servs., Inc. v. Lafferty, 856 P.2d 1188, 1192 (Ariz.Ct.App.
23 1992) (recognizing that a trustor's [sic: trustee's] obligation is only
to mail notice).

24 *Habig*, CV 10-2500-PHX-SRB, Doc. 30, p. 5 (May 6, 2011). Judge Bolton then noted that a
25 trustee's deed is conclusive evidence of compliance with the notice requirements, and that the
26 plaintiffs' defenses or objections to the foreclosure were barred by A.R.S. § 33-811(C).

27 The conclusion here is the same as that reached by Judge Bolton in *Habig*. If a trustor
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1 were able to void a sale that had already taken place based on a claim that the notice provisions
2 of A.R.S. were violated, A.R.S. § 33-811(C) would be rendered a “practical nullity.” *See*
3 *Luciano v. WMC Mortg. Corp.*, Nos. 1 CA-CV 08-0566, 1 CA-CV 08-678, 2010 WL 1491952,
4 at *5-6 (Ariz.Ct.App. Apr. 13, 2010) (citations omitted). The impact of such an approach would
5 result in the inability of a purchaser to confidently rely on the validity of the deed and would,
6 at the least, result in a reduction in prices obtained at foreclosure. Without legislative direction
7 to the contrary, the statute simply cannot be interpreted to allow for that result.

8 **D. Plaintiff has not pled a viable fraud or consumer fraud claim**

9 In all averments of fraud, the circumstances constituting the fraud must be stated “with
10 particularity.” Fed.R.Civ.P. 9(B); *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022-23 (9th
11 Cir.2000) (Fraud must be pled “with a high degree of meticulousness”). “By requiring the
12 plaintiff to allege the who, what, where, and when of the alleged fraud, the rule requires the
13 plaintiff to conduct a precomplaint investigation in sufficient depth to assure that the charge of
14 fraud is responsible and supported, rather than defamatory and extortionate.” *Ackerman v.*
15 *Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir.1999). The allegations must be
16 sufficiently “particularized” for purposes of Rule 9(b) and constitute a plausible claim for relief.
17 *Twombly*, 550 U.S. 544, 569 n. 14 (2007). The rule also applies to allegations of fraudulent
18 conduct under state consumer protection statutes. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120,
19 1125-26 (9th Cir.2009).

20 In alleging consumer fraud under A.R.S. § 44-1521, Plaintiff incorporates her allegations
21 of common law fraud. The fraud claims will therefore be analyzed together. As a threshold
22 problem, Plaintiff attributes all of the allegations of fraud to “Defendants.” As there are three
23 defendants in this action, general allegations of fraud are insufficient as they do not inform each
24 defendant of the acts of fraud in which it was allegedly involved. Moreover, other than a broad
25 range of time, most of the allegations do not identify when the statements were made.
26 Allegations like these are too vague and conclusory and are insufficient to satisfy the
27 particularity required by Rule 9(b). *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540
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1 (9th Cir.1989). As the Ninth Circuit has noted, a complaint must specify the alleged fraudulent
2 misrepresentation or omission, allege the falsity when made, identify the speaker, state when and
3 where the statements were made, and state the manner in which the representations were false
4 and misleading. *In re GlenFed, Inc. Secur. Litig.*, 42 F.3d 1541, 1547 n. 7 (9th Cir.1994)
5 (overturned on other grounds by statute). The allegations offered by Plaintiff do not begin to
6 meet these requirements.

7 **E. Plaintiff cannot succeed on her quiet title claim**

8 Plaintiff's quiet title claim is predicated on the success of her claim that the trustee's sale
9 was defective and/or that she was defrauded by the Defendants. A quiet title claim is a claim
10 for equitable relief whereby a plaintiff seeks to bar the defendant from claiming any right title
11 or adverse to plaintiff. A.R.S. § 12-1102; *Kennedy v. Morrow*, 77 Ariz. 152, 268 P.2d 326, 328
12 (Ariz.1954). Because the Plaintiff's fraud and statutory claims have been found insufficient to
13 support a claim of relief, the quiet title action also is also defective. Simply put, the Plaintiff has
14 not pled a claim that will survive dismissal and, thus, there is no potential basis upon which to
15 vest title in her.

16 **F. Leave to amend**

17 Plaintiff requests leave to amend to cure any defects in the complaint. Leave to amend
18 should be denied only if the court determines that "allegation(s) of other facts consistent with
19 the challenged pleading could not possibly cure the defect. *Schreiber Distributing Co. V. Serv-*
20 *Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir.1986). Here, the Court finds that the
21 defects identified in relation to Plaintiff's fraud claims might be cured by the addition of facts
22 consistent with those alleged in the complaint. Plaintiff should thus be granted leave to amend.

23 **IV. Recommendation**

24 Based on the foregoing, the Magistrate Judge **RECOMMENDS** that the District Court,
25 after its independent review, **grant** the Motion to Dismiss (Doc. 11) filed by Defendants Federal
26 National Mortgage Association ("Fannie Mae"), Bank of America, N.A. ("BANA"), individually
27 and as successor by merger to BAC Home Loans Servicing, L.P., and ReconTrust Company,

1 N.A. (“ReconTrust”) and **grant** Plaintiff Muoi Ho leave to amend her fraud claims.

2 This Recommendation is not an order that is immediately appealable to the Ninth Circuit
3 Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
4 Procedure, should not be filed until entry of the District Court's judgment.

5 However, the parties shall have fourteen (14) days from the date of service of a copy of
6 this recommendation within which to file specific written objections with the District Court. *See*
7 28 U.S.C. § 636(b)(1) and Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil Procedure.
8 Thereafter, the parties have fourteen (14) days within which to file a response to the objections.
9 If any objections are filed, this action should be designated case number: **CV 11-0324-TUC-**
10 **FRZ**. Failure to timely file objections to any factual or legal determination of the Magistrate
11 Judge may be considered a waiver of a party's right to *de novo* consideration of the issues. *See*
12 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.2003) (*en banc*).

13 DATED this 8th day of November, 2011.

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16 Jacqueline Marshall
United States Magistrate Judge

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